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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 344

CONTINENTAL DISTILLING CORPORATION,
Petitioner,

vs.

THE CONNECTICUT IMPORTING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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The petitioner, Continental Distilling Corporation, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause July 16, 1942.

I.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 A of the Judicial Code, as amended by the Act of February 13, 1925. The opinion of the Court below (R., pp. 519-527) is not yet reported. A petition for rehearing was denied August 5, 1942 (R., p. 538).

II.

Questions Presented.

1. In the absence of any *horizontal* agreement, is a producer of products sold under its registered trademarks, brands or names, liable to one of its wholesalers in damages under the Sherman Act for refusing to supply the wholesaler with its products because of the latter's failure to maintain suggested resale prices; and does the producer in any event become liable for damages claimed to have been suffered by the distributor subsequent to the effective dates of the Miller Tydings and Connecticut (applicable) Fair Trade Acts, because of the producer's continued refusal thereafter to supply the distributor with its products?

2. Even if a price-maintenance agreement had been made between the producer (petitioner), and its wholesaler (respondent) prior to the effective dates of the Miller Tydings and the Connecticut Fair Trade Acts, does the producer of products sold under its registered trademarks, brands or names, remain liable to the wholesaler under the Sherman Act subsequent to the effective dates of the Fair Trade Acts as a result of the producer's refusal thereafter to supply its products to the distributor because of the latter's refusal to abide by the provisions of such price-maintenance agreement?

3. Where the Trial Court in its charge and rulings on evidence withdrew from the jury's consideration petitioner's third defense, predicated on the Miller Tydings and the Connecticut Fair Trade Acts, and refused to permit petitioner to prove that its relations with its distributors thereafter were in conformity therewith, was the Trial Court justified in instructing the jury that it might award damages for the period after August 17, 1937,

the effective dates of those Acts, because petitioner had failed to prove that petitioner had offered respondent an agreement under the Fair Trade Acts?

4. Was there any evidence to establish a violation by the petitioner of the provisions of the Sherman Act?

5. Is a producer defendant in an action brought against it under the Sherman Act by one of its wholesalers entitled to have the issue of its right of customer selection, submitted to the jury, it having offered substantial evidence in support thereof; and did the refusal of the Trial Court to adequately and correctly instruct the jury on this issue and as requested, deprive the petitioner of a fair trial of the issues presented by the pleadings and the evidence?

6. Is an alleged conspiracy under the Sherman Act, once established, to be presumed to continue indefinitely in the absence of any proof of overt acts, combination or concert of action, there being in the record substantial evidence that the alleged conspiracy had terminated factually as well as by operation of law?

III.

Statutes Involved.

The pertinent statutes involved are:

1. Act of July 2, 1890, C 647, Secs. 1, 4, 26 Stat. 209; (Sherman Act), 15 U. S. C. 1, 15;

2. Act of August 17, 1937, C 690, Title VIII, 50 Stat. 693; (Miller-Tydings Act), 15 U. S. C. 1;

3. Chapter 138a, Sec. 593d, 1937 Supplement to the

General Statutes of the State of Connecticut (Connecticut Fair Trade Act). (Section 921 e of the 1939 Supplement.)

IV.

Statement.

This is an action at law under the Sherman Act. The trial was by jury, and respondent recovered a verdict for $16,000 which was trebled to $48,000. Attorney's fees in the amount of $6,500 were allowed by the Trial Court.

On appeal by petitioner and one other defendant (A. Sherman Manufacturing Company, Inc.), the Circuit Court of Appeals for the Second Circuit affirmed the judgment, and in addition allowed respondent an additional $1,500 for attorney's fees.

Petitioner, a Delaware corporation, located in Pennsylvania, produces distilled spirits, principally whisky and gin, which it sells throughout the United States under registered trademarks, brands or names, in free and open competition with distilled spirits of like grade and quality produced by other distillers (R., pp. 388-391). Its production of distilled spirits for the years 1936, 1937, 1938 and 1939 was less than 3% of the distilled spirits that were produced by all the distilleries in the United States. Likewise, its sales of distilled spirits within the State of Connecticut for the years 1936 and 1937 were less than 3% of the total sales of like products by all distillers within that state (R., pp. 367, 8, 9, 370, 384, 5, 6, 7).

In September 1936 it appointed the respondent as one of its Connecticut distributors. It then had five other distributors (subsequently discontinued) merchandising its products in that State.

At the time of respondent's appointment, petitioner had a resale price-maintenance policy, pursuant to which

it issued price lists containing suggested resale prices to be obtained by its distributors from retailers, and by the retailers from the public (R., p. 520).

The respondent and all of petitioner's distributors belonged to a Connecticut trade organization which was committed to price maintenance in the liquor business. Petitioner was not a member of this organization, membership therein being restricted to wholesalers or distributors.

In November 1936 petitioner adopted a quantity discount policy, and pursuant thereto and in answer to letters written to each distributor separately, received from each a letter agreeing to adhere to this quantity discount policy (R., pp. 427-432 inc.).

Respondent did not adhere to petitioner's suggested resale price policy (R., p. 57), and consequently in January 1937 petitioner discontinued respondent as one of its distributors.

Respondent instituted its action against the petitioner and two other distributors on April 12, 1939, and claimed a recovery for profits alleged to have been lost in the period intervening between its discontinuance and the date of suit, due to its inability to obtain and sell petitioner's merchandise.[1]

The petitioner claimed and introduced substantial evidence to the effect that in its dealings with all of its distributors, including the respondent, it was but exercising its right of customer selection, that in conformity therewith it had issued to each of them price lists containing suggested resale prices to be obtained by them from retailers and by the retailers from the public, and had announced to each of them in advance that it would elect to refuse to sell to any one of them who was unwilling to conform to this suggested resale price policy.

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[1] The verdict was against the petitioner and two of its distributors, one of whom went out of business in May 1937, the other being discontinued early in 1939.

Petitioner further contended on the trial that the letters which it received from each one of its distributors in answer to a letter written by it to them (Pltff.'s Exs. A, B, C, D, Defts.' Ex. 2, R., pp. 427-432), merely reflected the conformity of each of them to a quantity discount policy, and in no sense evidenced a combination or agreement upon the part of the distributors jointly to maintain prices generally on petitioner's merchandise.

The Circuit Court of Appeals spells out the agreement to maintain prices from the letters so written (R., pp. 521, 3). The Trial Court in its charge instructed the jury that the issue of price-maintenance agreements was in the background and of no consequence (R., p. 411).

During the 1937 Session of the Legislature of the State of Connecticut, the Connecticut Fair Trade Act was enacted (Sec. 593-d, Chapt. 138 A, 1937 Connecticut Cumulative Supplement). This law became effective July 1, 1937 and is now and has ever since that date been in full force and effect.

On the trial petitioner claimed and requested the Trial Court to charge the jury (*inter alia*) that because of the provisions of the Connecticut Fair Trade Act and of the Miller Tydings Act, which became effective August 17, 1937, its liability to the respondent (if any) under the Sherman Act did not continue beyond that date, *i. e.*, August 17, 1937, because it would have been lawful after that date for petitioner to make agreements with the respondent, and similarly with each of its distributors, prescribing minimum prices for the resale of its products which were sold under petitioner's tradename or brand.

The Trial Court overruled petitioner's claims and charged the jury that they might find that petitioner's liability continued beyond the date of the Miller Tydings Act, and that they could award damages to the plaintiff for the entire period up to the time when suit was instituted in April 1939 (R., p. 417). The amount awarded by the jury, $16,000, conclusively shows that it awarded

damages well beyond the effective date of the Miller Tydings Act, and indeed up to approximately January 1, 1939. Respondent's claim was that its total lost profits for the entire year 1937 were $8,920.72, and for the year 1938, $9,120.62 (R., pp. 415, 416).

Although the Trial Court withdrew from the jury's consideration petitioner's third defense predicated on the Miller Tydings and the Connecticut Fair Trade Acts, and refused to permit petitioner to prove that its relations with its distributors after the effective dates of those two Acts were in conformity therewith (R., pp. 307-317), it instructed the jury that it might award the respondent damages for the period after August 17, 1937, the effective date of those Acts, if the jury found that petitioner had failed to prove that it had offered respondent an agreement under the fair Trade Acts (R., p. 419).

Petitioner introduced substantial evidence that in its dealings with its customers it was but exercising its right of customer selection (Test. DuBois, Smith, pp. 262, 3, 4, 5, 306, 7), and specifically requested the Trial Court to submit this issue to the jury and to charge them adequately and correctly upon the validity of its conduct in this respect, if it should find the facts to be as testified to by the petitioner's witnesses, DuBois and Smith. The requested instructions were strictly in keeping with the principles stated by this Court in the *Colgate*, *Schrader*, *Beechnut*, and kindred cases discussed *infra*. The Trial Court refused to so charge the jury, and the Circuit Court of Appeals sustained its action.

Respondent on the trial claimed it had a contract with petitioner pursuant to which it was entitled to handle its products so long as the respondent remained in business and paid its bills, and the Trial Court charged the jury that they might, if they believed respondent's evidence in support thereof, award the respondent damages for that period, *i. e.*, so long as it remained in business (R., p. 417). Petitioner contended that respond-

ent could recover damages during the period after its discontinuance only by showing that the conspiracy had been kept alive, and by introducing evidence of overt acts or concert of action on the part of the alleged conspirators; and further, that because of the passage of the Miller Tydings Act and of the petitioner's discontinuance of its other distributors, and the termination of all relations with them, there was no evidence in the record from which the jury could find that the conspiracy had been kept alive after the passage of the Miller Tydings Act, and after petitioner had discontinued its other distributors, including the named defendants (Requests 8 and 10, R., pp. 406, 7).

V.

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that a producer of products sold under its registered trademarks, brands and names, is liable to one of its wholesalers in damages under the Sherman Act for refusing to supply the wholesaler with its products, because of the latter's failure to maintain suggested resale prices announced in advance by the producer, and in overruling petitioner's claim of law that because of the provisions of the Miller Tydings and the Connecticut Fair Trade Acts, petitioner's liability to the respondent, if any, did not continue after the effective dates of those laws.

2. In overruling petitioner's claim of law that even if a price-maintenance agreement had existed between the petitioner, the producer of products sold under its registered trademarks, brands or names, and the respondent, and between petitioner and any other whole-

saler prior to the effective dates of the Miller Tydings and the Connecticut Fair Trade Acts, and even if such agreement or agreements constituted a violation of the Sherman Act, the respondent could not recover damages alleged to have been sustained after the effective dates of the Fair Trade Acts, because of petitioner's refusal to supply its products to the wholesaler upon the latter's refusal to abide by the provisions of such price-maintenance agreement.

3. In sustaining the Trial Court in its charge and rulings withdrawing from the jury's consideration petitioner's third defense predicated on the Miller Tydings and the Connecticut Fair Trade Acts, and in sustaining the Trial Court in subsequently charging the jury that it might award damages for the period after the effective dates of those acts, if the jury found that petitioner had failed to prove that petitioner had offered respondent an agreement under the Fair Trade Acts.

4. In holding that the evidence established a violation by the petitioner of the provisions of the Sherman Act.

5. In sustaining the Trial Court in withdrawing from the jury the issue of retail price-maintenance agreements (R., pp. 411, 412), particularly in view of the fact that the Circuit Court of Appeals in affirming the judgment of the District Court based its decision substantially upon evidence before the jury of retail price-maintenance agreements as alleged in the Complaint (R., pp. 521-3).

6. In sustaining the Trial Court in refusing to submit to the jury, with proper instructions, the issue of the petitioner's right of customer selection, petitioner having submitted substantial evidence in support thereof.

7. In holding that the jury might find that a conspiracy, once established, continues indefinitely even though there be no proof of overt acts, combination, or concert of action, and even though there is before the jury substantial evidence that the alleged conspiracy had terminated factually as well as by operation of law.

VI.

Reasons for Granting the Writ.

A.

The construction, effect of, and interpretation to be accorded to the Miller Tydings and applicable State Fair Trade Acts, presents a novel, important question of federal law of national public interest, which has not been but which should be settled by this Court.

The constitutionality of State Fair Trade Acts (California and Illinois) affecting trademarked merchandise sold in intra-state commerce was first presented to and upheld by this Court in 1936.

> *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183;
> *The Pep Boys* v. *Pyroil Sales Co., Inc. and Kunsman* v. *Max Factor & Co.*, 299 U. S. 198.

Thereafter and on August 17, 1937, the Miller Tydings Act (amending Section 1 of the Sherman Act), was passed (15 U. S. C. 1). Prior thereto and effective as of July 1, 1937, the State of Connecticut had enacted a State Fair Trade Act. (Sec. 593d, 1937 Conn. Cum. Supp.)[2]

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[2] The Connecticut Act has been held constitutional by the Supreme Court of Errors of that state. *Burroughs Wellcome & Co., Inc.* v. *Johnson Wholesale Perfume Co., Inc.*, 128 Conn. 596.

The Miller Tydings Act legalizes *resale price-maintenance contracts* in interstate commerce, where such contracts are permitted by valid laws of the state wherein the merchandise is sold. The sole objective of Congress in passing the Act was to permit "the public policy of states having 'Fair Trade Acts' (resale price-maintenance laws) to operate with respect to interstate contracts for the resale of goods within those states."[3]

To accomplish that purpose the amendment limits the comprehensive provisions of Section 1 of the Sherman Act, by providing that nothing contained therein "shall render illegal contracts or agreements prescribing *minimum prices for the resale of a commodity* which bears or the label or container of which bears the trademark, brand, or name of the producer * * * when contracts or agreements of that description are lawful as applied to intrastate transactions," etc.

The amendment further provides that nothing in it shall permit manufacturers to combine with manufacturers, wholesalers with wholesalers, factors with factors, brokers with brokers, or retailers with retailers. This proviso was inserted in the bill after conferences between Senator Tydings and the Department of Justice, and "was accepted by the Attorney General as curing the objections of the administration."[4]

It is to be noted that the author of the Act was of the opinion that this proviso was unnecessary in that the amendment did not validate horizontal price-maintenance agreements.

That Congress intended to radically restrict the operation and scope of Section 1 of the Sherman Act in so far as it affected the producer or manufacturer of trademarked merchandise, is apparent. This "sound public

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[3] Report (3A-2) of the House Committee and the Judiciary, Mar. 11, 1937, 75th Congress, First Session, page 3.

[4] Congressional Report, Vol. 81, No. 140, July 23, 1937, page 9700.

policy on the part of the federal government lies in the direction of lending assistance to the states to effectuate their own public policy with regard to their internal affairs * * * especially * * * where such assistance, as in this instance, consists of removing a handicap resulting from the surrender of power over interstate commerce by the states to the federal government."[5]

See also 45 Yale Law Journal, 672.

The exemption provided for by the Miller-Tydings Act applies only to trademarked articles.

In *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp., supra,* this Court said (pp. 193-4):

> "The essence of the statutory violation then consists not in the bare disposition of the property but in a forbidden use of the trademark, brand, or name in accomplishing such disposition. The primary aim of the law is to protect the property—namely, the goodwill—of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end and not as an end in itself. * * * Appellants own the commodity; they do not own the mark or the goodwill that the mark symbolizes."

The proviso in the amendment was passed for the purpose of expressly interpreting the scope of the amendment, and to make it clear that it did not permit manufacturers to combine with manufacturers, wholesalers with wholesalers, or retailers with retailers, to fix and maintain resale prices. It was designed to deny validity to *horizontal* contracts between competing individuals, partnerships, or corporations. It does not restrict the right of the manufacturer or producer to make a series of agreements separately with each of its distributors

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[5] Report (3A-2) of the House Committee and the Judiciary, Mar. 11, 1937, 75th Congress, First Session, page 3.

binding them to maintain resale prices on the merchandise of the producer.

Neither the Miller Tydings nor the Connecticut Fair Trade Acts employs the terms "horizontal" or "vertical"; these are words of art that have obtained currency in anti-trust literature[6] and in the profession. While authoritative definition is wanting, there is no controversy concerning their primary meaning. An agreement is vertical when made by persons standing in a bargaining relationship to each other, as seller and buyer, or master and servant. An agreement is horizontal when made by persons standing in a competitive relationship to each other, such as persons on the same business plane or performing the same business functions.

The legislative history of the Miller Tydings Act discloses some use of the terms "horizontal" and "vertical", but here again the references are to the undisputed primary meaning of the words. No helpful statement is to be found in the debates which might be of assistance in classifying agreements.[7]

Decisions construing state fair trade acts refer to the two types of agreement, but the references are to clear and obvious differentiations.

> *Lilly* v. *Saunders*, 216 N. C. 163, 172, 3 (1939); *Port Chester Wine & Liquor Shop* v. *Miller Brothers*, 1 N. Y. S. (2) 802, 6 N. Y. S. (2) 147 (App. Div.); affirmed 281 N. Y. 101.

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[6] Grether, *Price Control under Fair Trade Legislation* (1939) pages 4, 14 *et seq.*; Zorn and Feldman, *Business Under the New Price Laws* (1937) page 289; Elliott, *Fair Trade and Resale Price Maintenance*, 10 So. Calif. L. R. 1, 4 (1936); (Legislation) 49 Harv. L. R. 811, 814 (1936).

[7] For a full legislative history of the Miller Tydings Act, see 81 Cong. Rec. (75th Congress) pages 6871, 6892, 7401, 7488-7497, 7599, 8139-8143, 8166, 8347, 8349, 8478, 9628; and Senate Report No. 879 of July 7, 1937. See also (Legislation) 51 Harv. L. R. 336 (1937).

See also:

Old Dearborn Distributing Co. v. *Seagram-Distillers Corp., supra*, p. 189.

Obviously, Congress in passing the Miller Tydings amendment never intended that a series of uniform vertical agreements, fixing resale prices made between the producer of trademarked articles and his wholesalers (validated by state fair trade acts), should be regarded as one comprehensive undertaking, horizontal in character and violative of the Sherman Act. To so hold would be to render the amendment a nullity, for its exemptive provisions would be limited to one single agreement between the producer and one of his wholesalers, and if more than one such agreement were made, a violation of the Sherman Act would result.

Recognition of this principle is implicit in a recent decision of this Court, in which the effect of the Miller Tydings amendment was considered.

United States v. *Univis Lens Co.*, 62 Supreme Court Reporter, p. 1088, decided May 11, 1942.

Involved therein was the validity of a series of price-fixing license agreements covering the purchase, finishing, and sale of a patented article, *i. e.*, bifocal eyeglass lens. These agreements were made by the producer (or patentee) with three distinct types of purchasers, *i. e.*, (1) wholesalers, (2) finishing retailers, and (3) prescription retailers.

This Court held that the agreements were violative of the Sherman Act and not within the protection of the patent monopoly, in that they purported to control resale prices on a commodity other than the precise one covered by the patent. In brief, it was held that the particular licensing arrangement involved was an invalid extension

of the patent monopoly and not within the ruling of the *General Electric* case (272 U. S. 476).

Patentee (producer) maintained that the various agreements it had made with some 330 wholesalers, 325 finishing retailers, and 6500 prescription dealers, were covered by "fair trade agreements" and were within the exemptive provisions of the Miller Tydings amendment.

The claim was overruled by the District Court (41 Fed. Supp. 258), and by this Court *solely* on the ground that the agreements purported to fix a resale price on the commodity which was not the *same commodity* which the producer had sold to the licensee; *i. e.,* the price was fixed on the finished product whereas the article sold was an unfinished product that had to be finished and completed by the producer. Thus (p. 1094):

> "The price fixing features of appellees' licensing system, which are not within the protection of the patent law, violate the Sherman Act save only as the fair trade agreements may bring them within the Miller Tydings Act."

And further (p. 1095):

> "But the Lens Company manufactures the blanks and not the finished lenses to which the resale prices apply. It is therefore not the manufacturer of the 'commodity' which the licensees sell, and the licensees are not engaged in the 'resale' of the same commodity they buy. * * * The prescribed prices are thus not within the Miller Tydings exception to the Sherman Act."

This factor is, of course, not involved in the case at bar.

Nowhere in the opinion is it suggested that the license agreements were *not* within the exemptive provisions of the Miller Tydings Act, on the ground that they involved

a series of vertical agreements fixing uniform resale prices between the producer and its licensees, which if regarded comprehensively would spell out a horizontal agreement by the licensees collectively to maintain prices.

It is proper to argue therefore that this Court is not disposed to regard a series of uniform vertical agreements between a producer and his wholesalers, fixing resale prices, as a comprehensive undertaking in any sense horizontal in character and not covered by the exemption accorded by the Miller Tydings Act.

In the furtherance of any state fair trade act, a manufacturer of a trademarked article is permitted legitimately to enter into an agreement with any wholesaler or distributor under a schedule of resale prices. He is not limited in making agreements of this character to one single wholesaler or distributor in that state. Of necessity the manufacturer will make a series of such agreements. The effect of a series of such agreements is to produce, comprehensively viewed, an entire agreement committing the distributors to maintain uniform prices and protection of the trademarked articles. To hold that a series of such uniform price-maintenance agreements are not covered by the exemptive provisions of the Miller Tydings Act, because of their effect when viewed comprehensively, and that a single price-maintenance agreement of this character is covered by the law, is to make a nullity of an act of Congress.

The Miller Tydings amendment also leaves unsettled the question of its effect on existing price-maintenance agreements outstanding at the time of its enactment.

Assuming in the instant case that some resale price-maintenance agreement was made by the petitioner and the respondent, and similarly by petitioner with each of the distributors in November 1936, the question presented is whether such agreements, if continued after the effective date of the Miller Tydings Act, are validated by its exemptive provisions.

The Circuit Court of Appeals in its opinion points out that after that date it would have been lawful for the petitioner to make price-maintenance agreements with each of its distributors; as a necessary corollary it could agree with them to refuse to sell to any distributor who did not obtain the fixed prices. Indeed, that undertaking is implicit in every fair trade agreement made pursuant to statutory authority.

Supervening legislation may invalidate agreements legal when made.

> *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 340-1;
> *Louisville & Nashville Railroad* v. *Mottley*, 219 U. S. 467.

It may also validate contracts and acts illegal when made or done.

> *Williston, Contracts* (Revised Edition, 1938), Vol. 6, Sec. 1758, pp. 4992, *et seq.*;
> *United States* v. *Chambers*, 291 U. S. 217, 223.

The unique feature of all state fair trade acts is their requirement (sustained as constitutional by this Court, *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, *supra*, p. 193), that both signers and non-signers are bound by the prices fixed by applicable resale price-maintenance contracts.

See Section 921 E, 1939 Conn. Cum. Supp., subsection f.

The statutes uniformly provide that *price-cutting* "is actionable at the suit of any person damaged thereby". Subsection f, Connectitcut Act, *supra*.

No doubt exists as to the right of a dealer of trademarked products, operating under a fair trade contract, to restrain his competitor from price-cutting.

Old Dearborn Distributing Co. v. *Seagram-Distillers Corp., supra;*
Burroughs Wellcome, etc. v. *Johnson, etc., supra.*

And no doubt exists as to the right of the producer of such products to withhold his products from such a price-cutter.

> "A trader or manufacturer carries on an entirely private business and can sell to whom he pleases."

Burroughs Wellcome & Co. v. *Johnson, supra,* page 601;
United States v. *Trans-Missouri Freight Association, supra;*
United States v. *Colgate & Co.,* 250 U. S. 300.

A dealer selling trademarked merchandise under a fair trade contract obtains and possesses "an interest in the property rights evidenced by the trade name, brand, or mark" and as a consequence of price-cutting activities by a competitor, sustains damage and injury to that property right, a remedy for which is given him by the fair trade acts.

Port Chester, etc. v. *Miller Brothers,* 1 N. Y. S. (2) 807.

The scope and extent of the remedy are not expressly defined in any of the acts. However, there appears to be no good reason why a wholesaler or retailer of a trademarked product could not, in a proper action, enjoin the *producer* of that product from selling it to a *price-cutting competitor.*

Respondent may argue the Miller Tydings Act to be inapplicable in the instant case because the purport of the agreement condemned by the jury involved the withholding by petitioner from it of its products. In reply, it is sub-

mitted that such a result is obtainable by a dealer under the state fair trade acts, and that a fair trade contract dealer has it in his power to prevent a price-cutter from obtaining or selling the trademarked merchandise, for he has a property right in that product. *Old Dearborn, etc., Co.* v. *Seagram, etc., Corp., supra; Port Chester, etc.* v. *Miller Bros., supra; Burroughs Wellcome, etc.* v. *Johnson, etc., supra.*

* * *

Petitioner relied upon the provisions of the Miller Tydings and the Connecticut Fair Trade Acts as a defense to any liability on its part subsequent to August 17, 1937, the effective date of the federal enactment. (See Third Defense, R., pp. 30-34.)

Respondent's motion to strike out this defense (R., p. 44), was denied (R., p. 46).

On the trial petitioner sought to prove that after the passage of the fair trade acts, it availed itself of their provisions by procuring from its wholesalers fair trade agreements, fixing resale prices (R., pp. 307-318).

Petitioner offered this evidence as a defense in bar. In a "*crucial*" ruling (R., p. 313), the Trial Court overruled petitioner's claim and limited the evidence offered solely "as having a possibly limited bearing on damages" (R., p. 314); it so instructed the jury (R., pp. 317, 417).

Thus petitioner was denied the full benefit of the fair trade acts, and was not permitted to show its compliance therewith, nor to prove that its price-maintenance agreements after August 17, 1937 were valid under those laws.

However, after the Court had completed its charge and in response to the request of respondent's counsel, it further charged the jury that they might consider, *in determining the liability of the petitioner*, that after the effective date of the fair trade acts petitioner had not offered respondent a fair trade agreement (R., p. 419).

In brief, at one stage of the case petitioner was not per-

mitted to prove that it had availed itself of the exemptive provisions of the Miller Tydings Act by entering into fair trade agreements with its dealers, yet at a later period therein it was held accountable to the respondent because it had not offered to make such a contract with respondent. This inconsistency of ruling by the Trial Court further illustrates the unsettlement of the question involved and is an added reason calling for the exercise of this Court's jurisdiction.

* * *

Summarized, petitioner's contention is that it was not guilty of a violation of the Sherman Act because prior to the effective date of the Miller Tydings Act it had no retail price-maintenance agreements with its distributors, and in its dealings with them it simply had an established policy of withholding its products from any one of them who did not obtain prices *suggested* by it for the resale of its merchandise. Further, even if it had had retail price maintenance agreements with them, its liability under the Sherman Act did not continue beyond the effective date of the Miller Tydings Law because under the provisions of that law and the Connecticut Fair Trade Act, resale price-maintenance agreements were validated. And this is so even if it had made a series of such agreements uniform in character, which might comprehensively viewed be regarded as *horizontal* in nature because such a result is within the contemplation of and validated by the provisions of the Miller Tydings Act.

In its ultimate aspects, the questions presented are of vital importance to the country's business world, as well as to the legal profession, and should be settled by this Court.

B.

The Circuit Court of Appeals in holding that the evidence before the jury was competent and sufficient to establish a conspiracy under the Sherman Act, has so far departed from the accepted and usual course of judicial proceedings and the decisions of this Court, as to call for the exercise of this Court's power of supervision.

Respondent's claim of conspiracy was predicated upon four incidents: (1) a meeting in September 1936 attended by representatives of three distributors who complained among themselves about the appointment of the respondent as a Continental distributor; (2) the letters written by petitioner to each one of its distributors and their several replies in November 1936; (3) evidence introduced by respondent's president as to statements made to him by the Connecticut sales representative for Continental on January 7, 1937 at the time when respondent was discontinued as a Continental distributor; and (4) a meeting held at the Hotel Taft on January 19, 1937 between representatives of Continental and representatives of its distributors in Connecticut, including the petitioner, at which the possible reinstatement of the respondent as a Continental distributor was discussed.

The Circuit Court of Appeals in upholding the verdict of the jury, concluded that these four incidents were of paramount importance (R., pp. 520-3).

Petitioner is not seeking to have this Court review the evidence for the purpose of testing the correctness of the conclusion reached by the jury thereon.

On the contrary, it contends that the rulings of the Trial Court (sustained by the Circuit Court of Appeals), in holding the evidence offered on these four points to be competent against and binding upon the petitioner, not only finds no sanction in the decisions of this Court, but are at war with them.

With respect to the January 1937 meeting, when re-

spondent was notified that it was to be discontinued as one of petitioner's Connecticut distributors, respondent's president, over petitioner's objection, was permitted to testify as follows: "I am here to advise you that we held a meeting with all the distributors and we have all decided, the distributors and my company, have decided to cut you off, that you are no more to receive our merchandise" (R., pp. 62-69, 250-252).

This evidence *prima facie* established concert of action on the part of the petitioner and the other distributors as alleged in the complaint, *i. e.*, a meeting held prior thereto between representatives of the distributors and petitioner, designed to bring about the discontinuance of the respondent as a Continental distributor.

There is no foundation in the record justifying the admission of this evidence. There is no evidence that any such meeting ever took place. The distributors handling Continental's goods at that time testified at the trial, one for the respondent and the others for the petitioner, and each and all denied that they ever had any such meeting or that they ever had any conversation with the other distributors having to do with an agreement to maintain prices. (See testimony of respondent's witness, Lapides, R., pp. 224, 225).

Moreover, the evidence as given gives no indication whatsoever as to when or where the claimed meeting took place or who attended it.

Declarations made by an agent of an alleged conspirator or wrong-doer which are narrative of past events, are never admissible as against his principal.

Vicksburg & Meridian Railroad Co. v. *O'Brien*, 119 U. S. 99, 103-106;

Goetz v. *Bank of Kansas City*, 119 U. S. 551, 560;

Boston & Albany Railroad Co. v. *O'Reilly*, 158 U. S. 334, 337.

The evidence of the meeting of the three distributors held in New Haven in September 1936 was clearly not competent to establish that the petitioner was in any sense a party to any conspiracy. No representative of the petitioner was present at that meeting. There is no evidence that it was ever informed of the meeting, or of the objections of the distributors to the appointment of the respondent as a Continental distributor.

Continental at that time was in no sense interested in any conspiracy seeking the elimination of respondent as one of its distributors. On the contrary, it was solely interested in prevailing upon respondent to consent to become one of its distributors.

Subsequently the respondent's witness who attended the September meeting, was permitted to testify, over petitioner's objection, that he "knew of his own knowledge" that as a result of that meeting respondent was "dropped as a Continental distributor" (R., pp. 201, 202). Thus the witness was permitted to testify of his own knowledge as to considerations which influenced action by a third party, without being required to state the source of his knowledge.

The Circuit Court of Appeals construes the letters written by the various distributors to the petitioner in November 1936, in answer to the petitioner's letter, as competent evidence of the existence of a price-maintenance agreement (Exs. 2, A, B, C and D, R., pp. 115, 122, 3, 4, 427, 8, 9, 431).

These letters reflected merely a uniform discount policy then adopted by the petitioner covering quantity shipments of and in excess of 25 case lots. Even if they can be construed as a series of price-maintenance agreements, they are vertical in character and within the exemptive provisions of the Miller Tydings Law. They are not competent to establish resale price-maintenance agreements, and the Circuit Court of Appeals erred in so holding.

Nor can the January 19th meeting be considered as competent evidence of a conspiracy *then* having its inception.[8] Respondent had been discontinued as petitioner's distributor on January 8, 1937 (Ex. 8, R., p. 438). Clearly if the discontinuance was lawful as claimed by the petitioner, the meeting of January 19, 1937 was not competent to establish a conspiracy originating at that time. The result of the conspiracy had already been achieved. If lawfully achieved, any subsequent meeting between the petitioner and its representatives would not be comptent to establish a conspiracy then having its "inception".

> *Northern Kentucky Tel. Co.* v. *Southern Bell T. & T. Co.*, 73 Fed. (2) 333.

On the other hand, if the respondent had been unlawfully discontinued prior to that date, that meeting is not competent to establish the *origination* of the conspiracy.

> *DeLuca* v. *United States*, 299 Fed. (C. C. A., 2nd) 741, 745.

The meeting was called at the suggestion of respondent's president who at that time had retained counsel to represent it in connection with the prosecution of its claim (R., p. 113). This obvious *entrapment*, the character of the testimony given, and the time when it was given, clearly establish it to be not competent to make out a conspiracy as against the petitioner herein.

Near the end of its case, respondent's witness was permitted to testify, over petitioner's objection, that in January 1937 when it was discontinued by petitioner, it was also discontinued as distributor by two other national

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[8] The Trial Court so charged (R., p. 413).

distillers, *i. e.,* National Distillers and Franfort Distilleries (R., pp. 244, 5). This evidence in and of itself permitted the jury to find the existence of a conspiracy on the part of the petitioner and *Frankfort* and *National,* as distillers, which was neither alleged, claimed, nor proven, and to predicate its finding of a conspiracy as charged in the complaint *herein* upon such testimony alone. That it is clearly not competent to establish the conspiracy charged and that the rulings of the Trial Court sanction a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision, is clear.

> *Ballew* v. *United States,* 160 U. S. 187, 193;
> *Waldron* v. *Waldron,* 156 U. S. 361, 383;
> *Boyd* v. *United States,* 142 U. S. 450, 458.

C.

The Circuit Court of Appeals in sustaining the Trial Court in its refusal to instruct the jury on petitioner's right of customer selection, so far sanctioned a departure by a lower court from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; its decision is at war with the applicable decisions of this Court.

Resale price-maintenance agreements between petitioner and its wholesalers were the gravamen of respondent's complaint (Complaint, Pars. 12, 13, 14, R., pp. 9-12). Petitioner denied that it had ever made any such agreements as alleged, and on the trial claimed and offered substantial evidence to prove that in its dealings with its wholesalers it was but exercising its right of customer selection by announcing in advance suggested prices for the resale of its products and its refusal to sell its products to any distributor who was unwilling to conform to this policy (Test. DuBois, Smith, R., pp. 262, 3, 4, 5, 306, 7).

Petitioner predicated the validity of its conduct on the applicable decisions of this Court.

U. S. v. *Colgate*, 250 U. S. 300;
U. S. v. *Schrader's Son, Inc.*, 252 U. S. 85, 99, 100;
Frey & Son v. *Cudahy Packing Co.*, 256 U. S. 208;
Federal Trade Commission v. *Beech-Nut Co.*, 257 U. S. 441, 452, 3.

Requests to charge the jury embodying these principles were duly submitted to the Trial Court (Requests 1-5, R., pp. 404-6). No such instructions were given. On the trial the Trial Court charged the jury that the issue of resale price-maintenance agreements was in the background and that it was not a main issue (R., pp. 411, 12).

Petitioner's conspiracy was founded upon alleged illegal price-maintenance agreements. Without proof of such alleged illegal agreements its conspiracy could not be established. Petitioner presented substantial evidence to support its claim that it had made no illegal agreements with any of its distributors, and as opposed to respondent's contentions, claimed that in its dealings with its distributors it was but exercising its right of customer selection.

The Circuit Court of Appeals relied heavily in affirming the jury's finding of a conspiracy upon proof of resale price-maintenance agreements (R., pp. 521-3). It held the doctrine announced in the *Colgate* case to be inapplicable.

This holding was clearly prejudicial to the petitioner and in probable conflict with the applicable decisions of this Court.

A litigant is entitled to have instructions given (if requested) presenting his theory of the case, based upon

the pleadings and proof. Instructions which exclude issues, theories, or defenses from the consideration of the jury, are erroneous where there is *any evidence* which justifies their submission to the jury.

> *Thorwegan* v. *King*, 111 U. S. 549;
> *Old Dominion Stages* v. *Connor*, 90 Fed. (2nd) 403, 406;
> *Union Pacific Railroad Co.* v. *Garner*, 24 Fed. (2nd) 53.

A party is entitled to have the law applied to the facts of his case provided he requests a special charge *even though the court may be of the opinion that such a fact is not established by a preponderance of the evidence.*

> *14 R. C. L.* Sec. 58, pp. 799, 800, and cases cited.

D.

The Circuit Court of Appeals in holding that a conspiracy under the Sherman Act, once established, may be found to continue indefinitely even though there be no proof that it has been kept alive during the intervening period, has so far sanctioned a departure from the usual course of proceedings as to call for the exercise of this Court's supervision; it involves an interpretation of a federal statute in apparent conflict with the applicable decisions of this Court, and of a prior decision of the Circuit Court of Appeals for the Second Circuit.

Respondent's cause of action was predicated upon an alleged continuing conspiracy (R., p. 13, Par. 17). Petitioner requested the Court to charge that before the respondent could recover it would have to prove overt acts and concert of action upon the part of the alleged conspirators during the period for which damages were awarded (Rec., p. 406, Request 8).

No such instructions were given.

On the contrary, the Trial Court specifically charged that the jury might find the conspiracy to be a continuing

one for the entire corporate existence of the respondent, and that they might award respondent damages for that period (R., p. 417).

This charge and this ruling are in apparent conflict with the applicable decisions of this Court.

> *U. S.* v. *Kissel*, 218 U. S. 601, 607, 8;
> *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 253;
> *U. S.* v. *Manton*, 107 Fed. (2) 834, 839;
> *Brooks* v. *U. S.*, 146 Fed. (C. C. A. 8th) 223, 229.

This Court in the *Kissel* case made it clear that a conspiracy ends "by success, abandonment, or otherwise", and stated "the mere continuance of the result of a conspiracy does not continue the conspiracy itself" (pp. 607, 8, 10).

Both the Trial Court and the Circuit Court of Appeals refused to attribute the slightest significance to the change in events and circumstances that took place between the date of petitioner's discontinuance of respondent and the trial of the action. During that period the petitioner had discontinued all business relations, not only with the named distributor defendants herein, but with all distributors with whom it was doing business at the time when the respondent was appointed as a Connecticut distributor. Obviously any conspiracy that may have existed between the distiller and its distributors had terminated, because none of the parties involved were in the slightest degree interested in price-maintenance by the distributors of Continental's products.

Moreover, the Miller-Tydings Act became effective on August 17th, and under that Act the petitioner could lawfully accomplish the purpose that the Court found it unlawfully attempted to accomplish through combination with its other distributors, *i. e.*, price-maintenance on the resale of its products. The Trial Court's failure to differentiate

between the *mere continuance* of the result of the conspiracy and the *conspiracy itself,* and to accord proper recognition to the change in conditions and circumstances that had taken place in the period intervening between respondent's discontinuance and institution of suit and trial of the action, was clearly the adoption of a principle at war with the applicable decisions of this Court.

Mr. Justice Holmes in the *Kissel* case said that a conspiracy might end "by success, abandonment, or otherwise". Obviously he had in mind in the use of the word "otherwise" that it might end by operation of law.

Respondent's cause of action was founded upon an alleged illegal price-maintenance agreement. Any invalidity attached to resale price-maintenance agreements of the character under review herein, was terminated by operation of law, *i. e.,* the passage on August 17, 1937 of the Miller Tydings Law. Clearly, thereafter the respondent would have no right of action against petitioner predicated upon resale price-maintenance agreements with its distributors because contracts of that nature were validated by that statute.

Moreover, the principle enunciated by the Circuit Court of Appeals herein in this respect is in conflict with the principle established by it in a case involving facts closely resembling those of this case, *i. e., Connecticut Importing Co.* v. *Frankfort Distilleries, Inc.,* 101 Fed. (2) 79.

In that case where there was involved the question of the continuance of a conspiracy and the recovery of damages in connection therewith, that Court said that the damages recoverable are only such as are *"due to continued refusal or refusals in furtherance of the conspiracy to supply it"* with the distiller's products, and that there would have to be proof of *"unlawful acts"* during the period of such refusal or refusals (101 Fed. (2) 81). (Italics ours.)

In the instant case the Circuit Court of Appeals ignored

this principle and said that "any continuance of the conspiracy beyond that period could have no effect on its right to damages after Continental had once terminated its agency with the joint action of the other defendants" (R., p. 525).

These principles are not reconcilable; indeed, they are in direct conflict. In the *Socony-Vacuum* case, this Court made it clear that there must be evidence in the case to show that the conspiracy has "been kept alive".

This doctrine was ignored by the Trial Court in its submission of the case to the jury, and by the Circuit Court of Appeals in its consideration of the case; under the principles adopted by those two Courts as controlling it may be claimed that a conspiracy can be found to continue indefinitely and forever and so long as the respondent is in business and is not supplied with petitioner's products, even though it is conclusively demonstrated that the alleged conspiracy has long since been terminated and abandoned and has not been kept alive.

Petitioner's claim is of paramount importance because respondent immediately following the decision of the Circuit Court of Appeals gave petitioner notice of its intention to institute another action against it, designed to recover damages for the period between the date of the suit involved herein, April 1939, and the time when the new suit might be instituted. Apparently it is the respondent's belief, predicated upon the decision of the Circuit Court of Appeals, that it has a permanent perpetual right to mulct the petitioner of damages so long as respondent is in business and is not supplied with petitioner's products.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify

and send to this Court a full and complete transcript of the record and of the proceedings of said Circuit Court of Appeals had in the case entitled on its docket No. 235, October Term, 1941, The Connecticut Importing Company, Plaintiff-Appellee, against Continental Distilling Corporation, Libbey & R. C. Williams Corporation, and Abraham Sherman, doing business under the name and style of A. Sherman Manufacturing Company, Inc., Defendants-Appellants, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, that the judgment herein of the Circuit Court of Appeals for the Second Circuit, as well as the judgment of the United States District Court for the District of Connecticut, be reversed by this Court, and for such further relief as to this Court may deem proper.

Dated at Stamford, Connecticut, this 26th day of August, 1942.

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(33) 3 v

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 344

CONTINENTAL DISTILLING CORPORATION,
Petitioner,

vs.

THE CONNECTICUT IMPORTING COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE COURT PRESS, N. Y. C.

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Supreme Court of the United States

OCTOBER TERM, 1942.

No.

Continental Distilling Corporation,
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vs.

The Connecticut Importing Company,
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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 129 F. 2d . It is found in the record at page 519. Rehearing was denied without written opinion on August 5, 1942.

II.

The reasons urged by the petitioner for issuance of the writ are without merit and present no novel question of widespread interest.

The principal contention of the petitioner is that the writ should be allowed inasmuch as the construction and interpretation of the Miller Tydings and Fair Trade Acts,

present a novel and important question which should be settled by this Court, and that the District Court and United States Circuit Court of Appeals have so far departed from the accepted and usual course of judicial proceedings and the decisions of this Court, as to call for the exercise of this Court's power of supervision.

The respondent contends that the petitioner in its brief fails to disclose either that the questions raised are of sufficient gravity or general importance to justify the exercise of the power to grant a writ of certiorari or that the decision of the United States Circuit Court of Appeals is in conflict with decisions of other Courts. As pointed out in the decision of the Circuit Court of Appeals in this case, neither the Miller Tydings Act nor the Connecticut Fair Trade Act have any application to the case at bar, because neither act legalizes a conspiracy to violate the Sherman Act. All of the other questions presented by the petitioner have either been answered in previous cases or that they present questions of fact only.

III.

Statement of the Case.

Because the petitioner in its brief fails to state sufficient facts fully and accurately to inform the Court of the basic facts of the litigation, it becomes necessary for the respondent to give a summary of the facts.

This is a civil action under the Sherman Anti-trust Act. The violations of the act consisted of a conspiracy between the defendant, Continental Distilling Corporation, (hereafter referred to as Continental), and the other defendants named in the complaint, as well as Austin Nichols and McKesson & Robbins, who were distributors,

to control wholesale and retail prices on the liquor products sold by Continental through its Connecticut distributors, and to boycott and blacklist all retailers and distributors, including the plaintiff who would not maintain the prices agreed upon. The elements of the conspiracy were that Continental appointed the plaintiff as the distributor of its products for the State of Connecticut in August, 1936 under a continuing agreement to supply it with its products; that the plaintiff relying upon the agreement employed additional salesmen and marketed substantial amounts of the products of Continental, the respondent at the time of its appointment was acting as a distributor of a number of nationally advertised liquors and had built up a substantial business throughout the State of Connecticut.

From the date of the plaintiff's appointment as a distributor until November 1, 1936, Continental limited its price maintenance policy to the issue of lists containing suggested re-sale prices from distributors to retailers and from retailers to the public. Although the plaintiff in its sales to retailers employed a percentage of mark-up less than that included in the suggested re-sale prices, Continental made no complaint to the plaintiff.

The conspiracy alleged in the complaint commenced in November of 1936. Its essential elements consisted of an agreement among the defendants and McKesson and Robbins to maintain re-sale prices from distributors to retailers and from retailers to the trade, the enforcement of the agreement by a system of espionage, blacklisting and intimidation, and the termination of the plaintiff's distributorship by the concerted action of the defendants and McKesson and Robbins because of the plaintiff's refusal to maintain the prescribed re-sale prices, and the sale by the plaintiff of Continental products to retailers on the blacklist.

The method used by Continental to enforce price maintenance was in general as follows:

Continental, through agents employed by it and designated as "missionary men", canvassed the retail stores for the purpose of ascertaining the prices at which they were selling Continental products and ascertaining the distributors from whom these products were purchased. Upon the ascertainment of the fact that a retailer was selling at prices below the prescribed resale price, the retailer was advised by Continental to desist from such practice. In the event of failure to desist, the retailer was reported to Continental's Sales Manager (R., p. 140).

Retailers who failed to conform to prescribed resale prices were placed on lists of undesirable customers, known as "blacklists", which were filed with the distributors, with instructions that sales of Continental products should not be made to the retailers thus "blacklisted" (R., pp. 148, 169).

Another means of enforcement was by buying out the stock of retailers who did not adhere to prescribed resale prices (R., p. 142).

Another means employed was to "smoke out" a retail store not adhering to prescribed prices, that is to employ a large group of men who would come into a store to purchase Continental products and who would at the same time fill the store with cigar smoke (R., pp. 156, 157).

Newspapers carrying advertisements of retailers who refused to conform to prescribed resale prices were threatened with the discontinuance of the national advertising of Continental if they continued to carry the advertisements of such retailers (R., pp. 171, 172).

To check the distributors selling to retailers who did not maintain resale prices, agents of Continental examined the serial numbers of the cases in retail stores, from which

the distributors selling Continental products to such stores could be determined (R., p. 144).

Continental's sales manager complained to the plaintiff's president that the other Connecticut distributors were complaining that the plaintiff was not maintaining prices (R., p. 60). He further stated that all of the other Connecticut distributors agreed to and did adhere to the Continental's policy of enforcing price maintenance and cooperated with Continental in its enforcement (R., pp. 58, 60, 335, 358, 427, 429, Plaintiff's Exhibits A, B, C, & D).

On the 7th day of January, 1937, Continental's sales manager called at the plaintiff's place of business and advised the plaintiff's president that Continental had held a meeting with all the distributors and it was decided at the meeting that the plaintiff would be cut off as a distributor of Continental products, because the plaintiff failed to adhere to the price maintenance policy of Continental and its distributors, and thereupon the plaintiff was discontinued as a distributor (R., p. 64). The plaintiff's president immediately communicated with the vice-president and general sales manager of Continental and as a result of this conversation, Continental called a meeting of all its distributors, to be held at the Taft Hotel in New Haven. At this meeting representatives of all the defendants were present. The plaintiff's president and secretary were invited by Continental's sales manager to attend the meeting. One of the defendants (Sherman) made a motion that the plaintiff's president and secretary leave the room so that the distributors and Continental could discuss and decide among themselves whether the plaintiff should be allowed to continue as a competitor distributor of Continental products. The plaintiff's president and secretary left the room and remained in the corridor of the hotel for an extended period of time when the door of the meeting room opened and

plaintiff's president and secretary were invited into the room and thereupon were informed by Continental's Sales Manager that "it was decided here that you gentlemen are to be definitely discontinued as our distributors" (R., p. 76). The following day Continental's Sales Manager called at plaintiff's place of business and requested the plaintiff to return all of Continental's merchandise, which it then had on hand, but the plaintiff refused to do so and continued to sell the same to the trade. The plaintiff has ever since been unable to secure Continental's products.

The damages claimed were the profits reasonably anticipated between the date of the termination of plaintiff's distributorship and the date of commencement of action.

The trial was by jury, and plaintiff recovered a general verdict against all defendants in the sum of $16,000, which was trebled by the Court. On appeal by petitioner and Sherman Mfg. Co., Inc. the Circuit Court of Appeals for the Second Circuit unanimously affirmed the judgment. The petitioner is the only defendant applying to this Court for a writ of certiorari.

IV.

Argument.

Petitioner's reasons why certiorari should be granted in this case may be briefly summarized as follows:

(a) The constructions and interpretation to be accorded to the Miller Tydings and the State Fair Trade Acts, presents a novel, important question of Federal Law which should be settled by this Court.

(b) The Circuit Court of Appeals erred in holding that the evidence before the jury was competent and sufficient to establish a conspiracy under the Sherman Act.

(c) The Circuit Court of Appeals erred in sustaining the trial court in its refusal to instruct the jury on petitioner's right of customer selection.

(d) The Circuit Court of Appeals erred in holding that a conspiracy under the Sherman Act, once established, may be found to continue indefinitely even though there be no proof that it has been kept alive during the intervening period.

V.

Each of these reasons will be hereafter discussed in its order.

A.

The Miller Tydings Act and the Connecticut Fair Trade Act have no application to the case at bar, and therefore no important question of federal law is presented for review by this Court.

The plaintiff's cause of action was based entirely upon a conspiracy between the defendant, Continental, defendant distributors and other distributors. None of the actions forming the elements of this conspiracy would be permitted either under the Connecticut Fair Trade Act or the Miller Tydings Act.

Plaintiff was removed as a distributor of Continental products on January 8, 1937 as a result of an agreement and combination between the defendants to exclude plaintiff as a distributor because of its failure to adhere to the price maintenance policy of Continental and its distributors. Thereafter and effective as of July 1, 1937, the State of Connecticut had enacted a State Fair Trade Act (Secs. 573d, 1937 Conn. Cum. Supp.). On

August 17, 1937, the Miller Tydings Act (Amending Sec. 1 of the Sherman Act) was passed (15 U. S. C. 1).

The Miller Tydings Act and the State Fair Trade Act did not relieve the acts of the defendants from illegality. On the contrary, *these Acts specifically provided that in spite of the exemptions permitting an agreement between a buyer and seller to fix prices it would still be unlawful for distributors of commodities to conspire together to fix prices.* This proviso was to the effect that the preceding exemption of contracts, prescribing minimum prices for resale, from the incidence of the Sherman Act did not make lawful any agreement

> "for the establishment or maintenance of minimum resale prices * * * between manufacturers, or between producers or between wholesalers * * * or between retailers, or between persons, firms or corporations in competition with each other."

In other words the violation of law would not be in the agreement of Continental to fix resale prices, but in the combination of the distributors with one another and with Continental to affect this result.

The petitioner on page 11 of its brief refers to provisions of Sec. 1 of the Sherman Act and states

> *"the amendment further provides that nothing in it shall permit manufacturers to combine with manufacturers, wholesalers with wholesalers, brokers with brokers, factors with factors, or retailers with retailers. It is to be noted that the author of the act was of the opinion this proviso was unnecessary and that the amendment did not validate horizontal price maintenance agreements."* (Italics ours.)

Since the petitioner admits in its petition that the Miller Tydings Act did not validate "horizontal" price maintenance agreements, and the entire record discloses that the claim and proof by the plaintiff was based upon a "horizontal agreement" between the defendants, there appears to be no reason for this Court to construe or interpret the Miller Tydings and Fair Trade Acts.

> "The Fair Trade Act was adopted to legalize 'vertical price fixing' between a manufacturer, a distributor, or a retailer, and hence price maintenance contracts which are the result of agreements between manufacturers or producers and which amount to 'horizontal price fixings', are not valid under the Fair Trade Act or the Sherman Anti-trust Act, as amended and are not enforceable."
>
> *Frank Fischer Merchandising Corporation* v. *Ritz Drug Co.* (1941), 19 A. 2d 454, 129 N. J. Eq. 105.

"Horizontal" price fixing agreements have been condemned by this Court by settled and repeated decisions.

Federal Trade Commission v. *Beech-Nut*, 257 U. S. 441, 452, 453;

United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 218, 224 note 59;

Ethyl Gasoline Corporation v. *United States*, 309 U. S. 436, 438;

United States v. *Trenton Potteries Company*, 273 U. S. 392, 397;

Such an agreement is illegal irrespective of the reasonableness of the prices. It necessarily restricts freedom of competition and is contrary to the policy of the Sherman Act. The Circuit Court of Appeals for the Second Circuit recently upheld a judgment awarding damages to the present plaintiff against different defendants under similar

facts. *Connecticut Importing Company* v. *Frankfort Distilleries*, 101 F. (2d) 79. The present situation is not one where Continental indicated that it would not sell to plaintiff if the latter did not observe its price schedules, but one where there was proof of an agreement among the defendants, and other distributors to maintain the schedules, and of a conspiracy on their part to exclude plaintiff as a distributor because it did not adhere to the price maintenance policy of Continental and its distributors. Accordingly, the doctrine announced in *United States* v. *Colgate & Co.*, 250 U. S. 300, upon which petitioner relies, does not apply.

In the *Colgate* case there was no such combination or agreement or any averment of any combination or agreement. The Court said, page 305:

> "There is no charge that the retailers themselves entered into any combination or agreement with each other, or that the defendant acted other than with his customers individually."

This Court in *Ethyl Gasoline Corp.* v. *United States* (decided March 26, 1940), 309 U. S. 436, 84 L. ed. 852, had occasion recently to pass on an action involving a violation of the Sherman Anti-trust Act and re-affirmed its previous decisions and said, on page 457:

> "The picture here revealed is not that of a patentee exercising its right to refuse to sell or to permit his licensee to sell the patented products to price cutters. *Cf. United States* v. *Colgate & Co.*, 250 U. S. *United States* v. *A. Schrader's Son*, 252 U. S. 85, 64 L. ed. 471, 40 S. Ct. 251. A very different scene is depicted by the record. It is one in which appellant has established the marketing of the patented fuel in

vast amounts on a nationwide scale through the 11,000 jobbers and at the same time, by the leverage of its licensing contracts resting on the fulcrum of its patents, it has built up a combination capable of use, and actually used, as a means of controlling jobbers' prices and suppressing competition among them. It seems plain that this attempted regulation of prices and market practices of the jobbers with respect to the fuel purchased, for which appellant could not lawfully contract, cannot be lawfully achieved by entering into contracts or combinations through the manipulation of which the same results are reached by the exercise of the power which they give to control the action of the purchasers. Such contracts or combinations which are used to obstruct the free and natural flow in the channels of interstate commerce or trade even in a patented article, after it is sold by the patentee or his licensee, are a violation of the Sherman Act. *Federal Trade Commission* v. *Beech-Nut Packing Co. supra* (257 U. S. 453, 66 L. ed. 313, 24 S. Ct. 150, 19 A. L. R. 882); *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, 66 L. ed. 708, 42 S. Ct. 363, *supra; Victor Talking Mach. Co.* v. *Kemeny* (C. C. A. 2d), 271 F. 810, 817; *cf. United States* v. *A. Schrader's Son*, 252 U. S. 85, 64 L. ed. 471, 40 S. Ct. 251 *supra*."

Similarly a different scene is depicted from the record in the case at bar than is pictured by the petitioners. In the present case there was an abundance of evidence of the practices condemned in *Federal Trade Commission* v. *Beech-Nut Co., supra*, where the Court said, page 453:

"The system here disclosed necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in the channels of

interstate trade which it has been the purpose of all the anti-trust acts to maintain. In its practical operation it necessarily constrains the trader, if he would have the products of the Beech-Nut Company, to maintain the prices 'suggested' by it. If he fails so to do, he is subject to be reported to the company, either by special agents, numerous and active in that behalf, or by dealers whose aid is enlisted in maintaining the system and the prices fixed by it. Furthermore, he is enrolled upon a list known as 'Undesirable-Price Cutters' to whom goods are not to be sold, and who are only to be reinstated as one whose record is 'clear', and to whom sales may be made, upon his giving satisfactory assurance that he will not resell the goods of the company except at the prices suggested by it, and will refuse to sell to distributors who do not maintain such prices."

B.

The Circuit Court of Appeals did not err in holding that the evidence before the jury was competent and sufficient to establish a conspiracy under the Sherman Act.

That the question whether there was sufficient evidence before the jury to establish a conspiracy under the Sherman Act was one of fact for the jury. This question was passed upon by both the District Court and the Circuit Court of Appeals. Surely this question is not of sufficient gravity or general importance to justify any review by this Court.

The conspiracy was clearly established as appears by the facts which were well stated in the decision of the Circuit Court of Appeals in this case (R., pp. 520, 521, 522, 523, 524.)

Without going into detail concerning the evidence offered by the plaintiff to establish a conspiracy, suffice it to say there was proof offered that Continental and its distributors agreed together to control and fix prices, and that in order to carry out and enforce the same, employed so called "missionary men" to canvass retail stores and to advise such stores as were found to be selling Continental products below the list prices to desist, and, if they did not desist, to report them to the distributors, blacklist them and prevent them from buying any more goods (R., pp. 148, 169). Other means Continental adopted to penalize retailers who refused to conform to the price schedule were to "smoke out" retail stores (R., pp. 156, 157) and to buy out their stocks of Continental goods (R., p. 142) and to induce newspapers not to carry their advertising (R., p. 172). The letters in which each promised to adhere to the price schedule of Continental (R., pp. 427, 428, 429), asserted inability of Continental to reinstate plaintiff without the consent of the other distributors, and the meeting of January 19, 1937, at which the reinstatement of plaintiff was refused (R., p. 76), it is a reasonable inference that:

(1) The defendants agreed in November, 1936 after the plaintiff had been appointed as a distributor, to maintain uniform prices in disposing of Continental products.

(2) When plaintiff did not conform to this price maintenance agreement, its competitors Libbey, Sherman, McKesson & Robbins and Austin Nichols insisted on removing the plaintiff as a distributor (to whom in fact they had objected from the beginning), and refused to allow it to be reinstated, and

(3) The defendants entered into a conspiracy to violate the Sherman Act which resulted in the loss of the plaintiff of its position as a distributor of Continental and

deprived it of its profits that it would have realized had it been allowed to continue its former status. As briefly pointed out the facts in the case at bar are similar to those in the *Beech-Nut* case, *supra,* which have been held to violate the Sherman Act. Mr. Justice Day speaking for the Court in the *Beech-Nut* case said (pp. 452-53):

> "We have already seen to what extent the declaration of public policy, contained in the Sherman Act, permits a trader to go. *The facts found show that the Beech-Nut system goes far beyond the simple refusal to sell goods to persons who will not sell at stated prices,* which, in the *Colgate* case, was held to be within the legal right of the producers."

After stating the facts the Court goes on further to say:

> "From this course of conduct a Court may infer, indeed, cannot escape the conclusion, that competition among retail distributors is practically suppressed, for all who would deal in the company's products and constrained to sell at the suggested prices."

C.

The trial Court did instruct the jury on petitioner's right of customer selection.

Here again the petitioner raises a question with regard to the instructions given by the Court to the jury. This claim is not of sufficient gravity or general importance to justify the Court in granting a writ of certiorari.

The Court did charge the jury on petitioner's right of customer selection (R., p. 411) as follows:

> "* * * for I think the issue is right there, whether

there was this concerted agreement, or whether the defendant, The Continental Company, was acting independently in the exercise of its own discretion in determining with whom it would deal. As has been stated here, it was and is the Continental's privilege to decide with whom it will deal and to refuse to deal with persons with whom it chooses not to recognize. And as long as it is acting in its independent discretion to do so, it is entitled to take this action."

The trial court is not required to adopt and use the language of a request to charge; it is enough if the instructions upon the point involved are correct and adequate.

Braithwaite v. *Lee*, 125 Conn. 10, 15, 2 Atl. (2) 380;
Pickens v. *Miller*, 119 Conn. 553, 555, 177 Atl. 573.

The right of Continental to prescribe resale prices as an independent action was not an issue in the case. The evidence offered by the plaintiff was directed against enforcement of arbitrarily fixed prices by *concerted action of Continental and the defendant distributors, and the termination, by defendants' concerted action, of plaintiff's distributorship becasue of its refusal to conform to such prices.*

D.

The Circuit Court of Appeals did not hold as claimed by petitioner that a conspiracy under the Sherman Act, once established, may be found to continue indefinitely even though there be no proof that it has been kept alive during the intervening period.

Again the petitioner urges a claim which appears to be of no general importance to justify the granting of any review by this Court.

The Circuit Court of Appeals in the case at bar did not hold as petitioner contends, but on the contrary, said (R., p. 525):

> "The wrong the plaintiff suffered occurred when it was excluded as a distributor. Any continuance of the conspiracy beyond that period could have no affect on its right to damages after Continental had once terminated its agency with the joint action with the other defendants."

There was competent evidence of the continuation of the conspiracy after the wrongful termination of plaintiff's distributorship in the circumstances under which the termination was effected, indicating in itself the finality of the decision of the conspirators in Continental's refusal to ship the plaintiff's order of January 5, 1937, in the demand that plaintiff surrender its stock of merchandise on hand, and in the continued inability of the plaintiff to buy Continental's products. Any further demand upon the part of the plaintiff would have been futile. It is difficult to comprehend what overt act there could have been in the circumstances of the case. The object of the conspiracy was the termination of the plaintiff's privilege to purchase Continental products and distribute them in competition with other distributors to the retail trade. The conspiracy having been successfully completed there would be no occasion for any further act upon the part of the conspirators, since the plaintiff had already been damaged as a result of the concerted action on the part of the conspirators.

Moreover, the rule as to the evidence required to prove the continuation of the conspiracy would differ in no respect from the rule as to the evidence to initially prove the conspiracy namely, that the conspiracy need not be shown

by direct evidence, but from such facts and circumstances in evidence as legitimately tend to sustain the inference of conspiracy. *United States* v. *Manton*, 107 Fed. (2) 834-839.

On page 29 of its petition, the petitioner claims that there is a conflict between the decision of the Circuit Court of Appeals in the case at bar and in the opinion of that Court in *Connecticut Importing Co.* v. *Frankfort Distilleries Inc.*, 101 F. (2) 79.

The facts in these cases were almost identical. However, on the question of damages, the plaintiff, in the *Frankfort* case claimed damages from the date it was wrongfully discontinued as a distributor to the date of trial. The trial court ruled that the plaintiff could not recover damages beyond the date of suit. The Circuit Court of Appeals in sustaining this ruling stated, page 81:

> "The recoverable damages were only those sustained by the plaintiff from the time the cause of action accrued up to the time the suit was brought. *Frey & Son, Inc.* v. *Cudahy Packing Co.*, 243 F. 205."

The petitioner's quotation of the Court's opinion in the *Frankfort* case, while incomplete, refers to the discussion in the opinion, of the reason why damages could not be recovered beyond the date of suit, the Court saying, page 81:

> "Here the plaintiff's damages, if any, after the commencement of the suit were due to continued refusal or refusals, in furtherance of the conspiracy, to supply it with the Frankfort products after that time. The unlawful acts which would give rise to such damages had from their nature to be committed in carrying out the conspiracy after the suit was

brought. It would be impossible to predict how long such a conspiracy would remain in existence or how long the refusal to sell to the plaintiff would continue and, even if such damages could, in a sense, be treated as the result of refusing to supply before suit was brought, they would be purely speculative."

In the case at bar, no claim was made by the plaintiff for damages subsequent to the date of the commencement of action, and as the Court said, page 81,

> "no testimony was offered of damages computed beyond estimated profits which might have been realized up to the date of suit."

Since the claims for damages differ in these respective cases, there is no conflict between the decisions.

In the instructions of the trial judge to the jury on the determination of damages, the jury was charged that the damages recoverable should be limited to the profits which could have been anticipated by the plaintiff for a period of the probable expectancy of the continuation of the distributorship, not longer than the interval between the date of the termination of the distributorship and the date of commencement of action. The anticipated profits were proved by a report of the Special Master appointed by the trial court. Continental filed no exceptions to that report, which was offered in evidence by the plaintiff. The damages awarded by the jury were less than the profits which could have been reasonably anticipated on the basis of the report of the Special Master.

The question of whether the plaintiff can recover damages by the institution of another action was not before either the District Court or the Circuit Court of Appeals and surely will not be considered by this Court. To ask this Court to take jurisdiction for the purpose of

passing upon a question which is not involved in this case and completely outside of the record would be asking it to render an advisory opinion.

Conclusion.

There is no conflict between the decision of the Circuit Court of Appeals in the present case and any decision rendered by this Court, nor is the decision in conflict with the decision of the Circuit Court of Appeals of any other Circuit. There is not even a reasonable basis for a claim of error in any conclusion reached by the Circuit Court of Appeals.

It is therefore respectfully submitted that this is not a case for review by certiorari in this Court, and that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 344.

CONTINENTAL DISTILLING CORPORATION,
Petitioner,

vs.

THE CONNECTICUT IMPORTING COMPANY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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THE COURT PRESS, N. Y. C.

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TABLE OF CASES CITED:

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The petitioner specified as one of the errors to be urged that the Circuit Court of Appeals erred in sustaining the Trial Court in ruling that the jury might find that a conspiracy, once established, continues indefinitely even though there be no proof of overt acts, continuous cooperation, or concert of action upon the part of the alleged conspirators during the intervening period (Petition, p. 10). It urged as a reason for granting this writ that the question presented was of general importance, that the holding of the Circuit Court of Appeals so far sanctioned a departure by the Trial Court from the usual course of proceedings as to call for the exercise of this Court's supervision, and further, that the holding involved an interpretation of a federal statute in apparent conflict with the applicable decisions of this Court and of a prior decision of the Circuit Court of Appeals for the Second Circuit (Petition, pp. 27, *et seq.*).

The Respondent in its brief maintains that the question presented appears to be of no general importance (Respondent's Brief, p. 15), and suggests that as the question of the right of the plaintiff to recover damages by the institution of another action upon the theory of a continuing conspiracy was not before either the District Court or the Circuit Court of Appeals, it will not be considered by this Court (Respondent's Brief, pp. 18, 19).

This question was clearly presented both to the Trial Court and the Circuit Court of Appeals. (See Brief for Appellant filed with the Circuit Court of Appeals, pp. 21 to 29 inc.).

A.

The right of one claimed to have been injured by a violation of the Sherman Act, to recover damages in successive actions predicated upon the theory of a continuing conspiracy, without being required to show continuous co-operation upon the part of the alleged conspirators, presents an important question of Federal law which should be settled by this Court.

Since the filing of the petition herein, Respondent has instituted another suit against the Petitioner, seeking therein to recover damages in the amount of $90,000 claimed to have been sustained in the period between the date of the filing of the complaint in the action involved herein and the date of the second suit. The cause of action alleged therein is framed upon the theory of a continuing conspiracy. The summons was issued by the Clerk of the United States District Court for the District of Connecticut on August 25, 1942, the same being Civil Action No. 843.

The complaint in the second action is identical with the complaint appearing in the record herein except for the inclusion of one additional paragraph covering the allegation of a continuing conspiracy, viz. Paragraph 21:

> "The defendants have continued said unlawful conspiracy and combination from April 12, 1939 to the present time during all of which time the defendants have refused to supply the plaintiff with their products which refusal is and has been a direct result of the combination and conspiracy set forth in Paragraphs One to Nineteen hereof."

Obviously it is Respondent's position that a conspiracy, once established under the Sherman Act, may be found to continue indefinitely without proof of continuous cooperation upon the part of the alleged conspirators and without proof that it has been kept alive during the intervening period. Possible support for this claim may be found in the Opinion of the Circuit Court of Appeals. Thus, (p. 525):

> "The wrong the plaintiff suffered occurred when it was excluded as a distributor. Any continuance of the conspiracy beyond that period could have no effect on its right to damages after Continental had once terminated its agency with the joint action of the other defendants."

It is submitted that this principle is in apparent conflict with the prior opinion of the same Court, in the case of *Connecticut Importing Co.* v. *Frankfort Distilleries, Inc.*, 101 F. (2) 79, 81, and is also in apparent conflict with the applicable decisions of this Court in *U. S.* v. *Kissel*, 218 U. S. 601, 607, 8, and *U. S.* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 253.

In the *Socony Vacuum* case, this Court held that there must be evidence in the case to show that the conspiracy had "been kept alive", and reached the conclusion that that requirement had been satisfied in that case by evidence of the making, during the time while the conspiracy was claimed to be in operation, of sales to jobbers and consumers at enhanced prices because (p. 253) the "*making of those sales supplied part of the 'continuous cooperation' necessary to keep the conspiracy alive.* See *U. S. v. Kissel*, 218 U. S. 601, 607." (Italics ours.)

Whether or not one claimed to have been injured by a violation of the Sherman Act can continue to recover damages indefinitely upon the theory of a continuing conspiracy without being required to prove continuous cooperation upon the part of the alleged conspirators or that the conspiracy has been kept alive during the intervening period, presents an important question of public interest involving the correct interpretation to be accorded to the provisions of that Act and the rights of parties claimed to have been injured by its violation to recover damages thereunder.

Dated at Stamford, Connecticut, this 30th day of September, 1942.

Respectfully submitted,

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